IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Plaintiff in Error,* *vs.* SPOKANE INTERSTATE FAIR ASSOCIATION, *Defendant in Error.*	No. 4639

Error to the United States District Court of the Eastern District of Washington, Northern Division

Brief for Defendant in Error

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Spokane, Washington
Attorneys for Defendant in Error.

EMPIRE PRINTING CO., SPOKANE

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Foreword.

We shall refer to the parties by their designations below, speaking of the plaintiff in error as defendant, and of the defendant in error as plaintiff.

Defendant did not challenge the sufficiency of the evidence at the close of plaintiff's case. Necessarily, that was an admission that plaintiff had made a *prima facie* case. At the close of all the evidence, defendant challenged the sufficiency of the evidence, and its principal assignment of error, apparently, is the denial of that challenge. It is, therefore, asking the Court to read and consider plaintiff's evidence, then read and consider the evidence introduced by defendant, and determine whether the *prima facie* case made by plaintiff was not destroyed, as matter of law, by defendant's evidence. In view of that request, we want to say a word concerning the transcript of evidence which the Court must read if it is to critically examine and weigh the evidence. It bears upon its face evidence that the testimony was either very badly reported, or that the reporter's notes were very badly abstracted. To make the situation worse, there are many material errors in the printing of the transcript of evidence. As an illustration, on page 82 there are several transpositions, leaving the greater part of that page meaningless. Again, at page 120, at the conclusion of the testimony of the witness Jordan, there are not only transpositions but evident omissions. How

much was omitted and what its materiality cannot be told. There are a number of other equally flagrant errors, which we shall not take time and occupy space to point out. Suffice it that the face of the transcript shows that its contents are not clear and complete, and that it is impossible for this Court to possess itself of the evidence as it was presented below. That in itself is sufficient cause for declining to weigh the evidence for the purpose of determining whether plaintiff's *prima facie* case was overcome by defendant's evidence.

Sufficiency of the Evidence to Sustain a Recovery.

By eking out the garbled transcript (we do not use the term to import unfairness, but only incompleteness and confusion) with references to the plats and photographs in evidence, it is possible to obtain a fair general idea of the case presented. We shall state the material facts as we gather them from the record, and the theory which we think they sustain, before replying to defendant's argument.

For some considerable period, plaintiff has conducted a fair and exposition at its grounds in the city of Spokane. The fair is held annually, for a week during the first days of September. Except during the actual duration of the fair, and for a short period of preparation and dismantling immediately preceding and following it, the fair grounds and buildings are unused and unoccupied.

Among other buildings on the fairgrounds is a

grandstand. This structure opens to the east upon the racetrack. Flanking it on the north and south are "bleacher" seats, also opening to the east on the racetrack. See blueprint, plaintiff's exhibit 3. The upper seats of the south bleacher are attached to the grandstand. The lower seats are cut away, leaving an opening between bleacher and grandstand. See plaintiff's exhibit 4, where the opening is marked "driveway," and plaintiff's exhibit 6, where the opening appears in the foreground of the photograph.

Underneath the south end of the grandstand, and opening to the west, several rooms have been constructed, which are used for offices while the fair is in progress. See plaintiff's exhibit 4, which shows the arrangement of the offices, and plaintiff's exhibit 10, which shows the manner in which they are built into the grandstand. The room farthest back, *i. e.,* farthest to the east, is the auditor's office room. There is no entrance to this room except through the offices in front, *i. e.,* to the west, of it. The east wall of the room, which separates it from the empty space under the grandstand, is of wood, without openings in it. There are two windows in the south wall, but these are covered with a heavy steel netting, so that access to the room cannot be gained through them. About the center, along the west wall, of the auditor's room, is a steel cashier's cage. To the west of the cage, and opening into it, is a vault, and in this is a safe in which the money taken in

during the day is kept until it is deposited in the bank. The cashier's cage, a part of the east wall and the north wall of the auditor's room, including the table underneath which the panel opening into the room from underneath the grandstand was discovered, are shown by the photograph, plaintiff's exhibit 8.

In preparing for the opening of the fair in 1922, two years before the burglary which is the cause for this suit, plaintiff's officers were unable to open the safe, the card containing the combination numbers having been lost, and no one remembering what they were. Plaintiff's manager sought help from a safe agency, and it sent an expert locksmith, the witness Larson, to open the safe. It seems that no expert ever attempts to open such a safe by manipulating the lock until he learns the numbers, as that would be an interminable and probably fruitless task. Instead he drills a hole into the lock, and by inserting a wire and using it in a manner known to experts, in a few minutes is able to learn the numbers and work the combination. Larson so proceeded in this case, drilling a hole through the dial rim and safe door at the point where experts usually drill when doing such work. When he had got the numbers and opened the safe, he removed the dial rim, drove a steel plug into the hole he had drilled in the door, and put on a new dial rim. When that rim was put on it covered the plug, so that from the exterior there was no indication of what had been

done, and the safe door appeared to be in the same condition as when it came from the factory. The safe door, lock, plug and dial rim were not disturbed from that time until the time of the burglary involved in this case.

In 1924 the fair opened on Monday, as usual. There were heavy receipts on Thursday, which was the big day of the fair. It was the custom to keep each day's receipts in the safe in the vault over night; bank messengers coming out to get the money the next morning. Thursday night the cashier made up his cash as usual, and put all the money on hand in the safe, except some sacks of silver which were too bulky to go into the safe, and were stacked by its side in the vault. The auditor supervised the operation. The cashier then looked around the cage to see that no money was left out, and reported everything in order. The auditor then closed and locked the safe door, throwing the combination; closed the inner doors of the vault, which were not locked; and then closed and locked the outer door of the vault, throwing the combination. He was seen to do those things by the cashier, and both were positive that the outer vault door and the safe door were locked and the combinations thrown. Both men left the room in a short time, between 10:30 and 11 at night.

The auditor was the first to come on duty in the auditor's room the next morning, reaching there at eight. His first act was, as usual, to open the vault.

The outer vault door was closed and locked, and he opened it by working the combination. When he opened the outer door, he saw that the inner doors, which he had closed the night before, were open. Turning on the vault light, he saw that the safe door was open, and that the contents of the safe had been disturbed. He immediately called other employes of the fair and telephoned to the fair officials and the police. An examination was made when the police arrived, and it was found that all the money put in the safe and the vault the night before had been taken.

We shall now digress to remark upon such of the surroundings as are pertinent to the manner of the burglary.

By referring to the blueprint, plaintiff's exhibit 3, it will be observed that the west wall of the grandstand structure, through which access is had to the offices under the grandstand, opens on the Midway and on the buildings used for exhibition, restaurant, and amusement purposes. This space was all brilliantly lighted at night when the fair was in progress. To reach the auditor's office, in which 17 electric lights, some of them of 100 watts or over, were kept burning all night long, it was necessary to pass through the main office, and by the side of the police room. These rooms were lighted, and police and other employes were in or passing in or out of these rooms at all hours of the night. No interloper could get into the auditor's room from the west, and

make the trips in and out which would be necessary to carry away the money that was taken—which included seven sacks of silver, each containing $500—without being discovered. Given a means of entrance, however, access could be readily had to the auditor's room through the east wall without discovery. The grandstand opened to the east upon the racetrack and the waste space which it surrounds. At night these were, of course, deserted and unlighted. Immediately south of the grandstand, the sweep around the curve in the track, extending to a point on its east side, is protected and screened by heavy shrubbery. Just beyond the shrubbery is the outer fence of the fairgrounds, beyond which, again, is a railroad right of way and tracks. Given a means of exit through the east wall of the auditor's room and through the grandstand, one could pass at night as many times as one pleased out to the racetrack, the shrubbery, and through the fence by gates or loose boards, without fear of detection. Nor, given a means of entrance through the northerly portion of the east wall of the auditor's room, was there any probability that a man who kept to the north end of the room would be detected by persons in the front offices, provided he moved silently. Referring again to plaintiff's exihibit 4, it will be observed that the entrance to the cashier's cage and to the vault is concealed by the vault itself from the observation of anyone in the outer offices. Only by going back to the auditor's room, passing into it by the door at the south end of its west wall, and around

the cashier's cage to the north end of the room, would the presence of any one in the vault be discovered.

Returning to the occurrences just after the burglary, several detectives from the police force, and a private detective, were at once put on the case. They worked on it for two days, and discovered nothing which would throw any light on the manner in which the burglary was committed. Sunday morning a new man, Hudson, was put to work. After looking over the situation, he reached the conclusion that whoever took the money could not have come in by the west entrance, and taken the money out that way, as he would certainly have been detected by the employes who were on duty at night had he pursued that course. The necessary inference was that access to the room had been gained through the east wall. Hudson therefore began to search for any trace of an entrance effected there. He seems to have begun his search in the unused space under the grandstand (for the nature of which see photograph, plaintiff's exhibit 9), for his first clue was the discovery of cleats nailed across some boards on the inside at the extreme southeast corner of the grandstand. Following up the clue, he found that several boards had been sawed at that point so as to separate them from the rest of the wall, and that cleats had been nailed across them and leather hinges fitted to them on the inside so as to make a door in the grandstand wall. On the outside, care had been taken by the use of white paint mixed

with earth to give the door the same appearance as the remainder of the wall. Tr., 55, 73.

The location of this door in the grandstand may be seen by reference to the photograph, plaintiff's exhibit 6. It is marked by the dark boards in the photograph. The police took the original door, and the hole left had been patched with boards before the photograph was taken. Tr., 53. It will be noted that the door opened within a few feet of the racetrack, and that one coming from the outside in the shadow of the shrubbery along the racetrack, on the dark side of the grandstand, could reach the door with scarcely a chance that he would be detected.

Stimulated by the discovery of the door in the outside of the grandstand, Hudson called to his assistance several employes of plaintiff, and they began a minute examination of the east wall of the auditor's room, seeking a door. With some on the outside, others on the inside, they set out to tap and try every inch of the wall. A sliding door or panel leading into the room from underneath the grandstand was finally discovered. It was in the extreme northeast corner of the room, and was made and put in place with such nicety and precautions against its discovery that it would not have been discovered by any less careful search than that made by Hudson. Tr., 71-74. It opened into the auditor's room under a table which was fastened into the east wall. See photographs, plaintiff's exhibits 7 and 8. Plaintiff's exhibit 9 shows the location of the panel

in the outside wall of the auditor's room, underneath the grandstand. It should be observed that these photographs do not show the panel in place. The police took the panel, and the photographs were taken after the hole so left had been patched. Tr., 53-54.

We go on now to the manner in which entrance into the vault and safe was effected.

The morning the burglary was discovered, two expert locksmiths, Bolt and Corey, were sent to the fairgrounds. They made a casual inspection of the safe, and seeing nothing wrong with it paid no further attention to it. Examining the outer vault door, they discovered that the screw which connected one of the bolts to the main draw bar had been cut or removed, so that when the handle of the door was turned to shoot the bolts into their sockets and fasten the door, that particular bolt would not be moved. Friction tape, so fresh that it was sticky, was wrapped around that bolt, to prevent the other bolt from clanging against it and making a noise. They discovered, also, that the vault door was sprung in such a manner that if the disconnected bolt had been forced into its place, as it would have been had it been left connected to the main draw bar, it would have caused considerable noise when the door was opened and closed. Tr., 99. Previous to the robbery, it was noticed that the bolts in the vault door had been freshly oiled. Tr., 69. It ap-

parently was not oiled by any one connected with the fair. Tr., 76-77.

Matters remained in that situation for two or three weeks. Plaintiff employed a firm of lawyers to take up the case, and one of them desired to go carefully into the conditions surrounding the burglary. Tr., 56. He went to see Corey, one of the locksmiths who had examined the safe the morning after the robbery, and inquired if Corey had made a detailed examination of the safe. Corey acknowledging that he had not, arrangements were made for Corey, several officers of the fair, and the lawyer to go out and examine the safe. Corey took the entire lock out and examined it carefully. The first unusual thing he discovered was a drill mark on the carrier tumbler. When he took out the screws holding the dial rim, the rim did not fall off, and when he took it off with his fingers, he found "shavings," *i. e.,* particles of steel caused by the operation of a drill, underneath the rim. Next he discovered the hole which Larson had drilled through the door into the combination lock. The plug which Larson had driven into the drill hole was gone. The plug could have been removed from the outside by drilling it out with a drill the same size as the plug, or by drilling into it with a drill of a smaller size, running threads in it, inserting a tap, and then pulling it out. The only other way in which it could be removed would be by opening the safe door, removing the combination, and driving

the plug out from the inside. Tr., 81-83, 86-91.

Upon the discovery of the things just noted, the police were called. On their arrival, Corey was asked to explain how a safe could be opened through such a hole as that found in the safe door. He attempted to do so, using a large flashlight in explaining the method. In order to concentrate the light on the door, the light in the ceiling of the vault was turned off. In the course of the explanation, the flashlight was turned down to the base on which the safe stood, and this disclosed steel filings, such as would be made by drilling into the safe, scattered over the base and for some inches out in front of it, and within a radius of perhaps a foot and a half or two feet. Tr., 57-58, 89. In drilling a hole into steel, the filings or shavings thrown out by the drill do not all fall straight down. They will be scattered around, the distance they are thrown depending on the speed at which the drill is operated. Tr., 89-90.

The matters above stated are not in dispute. The evidence establishing them permits of but one reasonable theory as to the manner in which the burglary was effected. It is this: Some time before the fair opened in 1924, a skilled yeggman (probably there were two or three in the job, but it is more convenient to speak in the singular) planned to rob the safe some night during the progress of the fair; preferably, if there were no preventing circumstances, on the night of the largest day of the fair, when there would be more money in the safe than

at any other time. Probably he was about the fair during the preceding year, and observed the manner in which operations were conducted during fair time. Possibly he was able to obtain all the information he needed by a study of the buildings and surroundings during the summer, when the fair was not in progress. There was nothing at that time to prevent him making as careful a study as he desired. The fairgrounds are extensive and secluded, and during the intervals between fairs the grounds are deserted. Tr., 68. These problems confronted him: To arrange for an entrance into the auditor's room where he would not be exposed to detection in going in, getting the money, and making the several trips that would be necessary to carry it away if it were largely coin: To make such preparations beforehand as would enable him to make his entrance and get the money speedily and noiselessly, for during the progress of the fair there were a number of employes around the main office, even at night, who might by chance come into the auditor's room, and who would probably hear any noise that might be made in entering the auditor's room, the vault, or the safe: To so conceal his preparations that they would not be discovered before the time he wished to commit the burglary.

Now, whether the yeggman made his observations the preceding year during fair time, or during the month or so preceding the fair in 1924, it is certain that he would at once put out of consideration any

thought of getting into the auditor's room from the west side of the building. He had to get into the room not only, but to make the several trips that would probably be necessary to carry away the money. It would manifestly be impossible to do that, undetected, from the west. Referring to the blueprint, plaintiff's exhibit 3, it will be observed that the west side of the grandstand gives upon the most frequented, and consequently the best lighted, part of the fairgrounds. On that side are all the principal entrances, all the exhibition buildings, amusement resorts and restaurants. While the fair was in progress, there were 24 men on duty on the grounds at night. Tr., 68. The auditor's room and vault were back of the main office, police room, and other offices used in the conduct of the fair. Plat, plaintiff's exhibit 4. Employes would, of course, be in and about those offices during the night. No sane man, to say nothing of an experienced yeggman, would dream of trying to reach the vault and carry out the money through the entrance from the west. Equally beyond consideration would be the windows in the south wall of the auditor's room. These were protected by steel netting. If this were cut away before the perpetration of the burglary, its removal would be discovered and the intended crime be suspected and guarded against. If it were cut away the night of the burglary, the noise made would almost certainly attract the attention of watchmen. At any rate, any one attempting to carry away the money through those windows would

be in almost as exposed a position as he would be if he attempted to take the money out through the west entrance.

There was, clearly, but one practicable way of effecting an entrance to the auditor's room, and that was from the east, approaching through the unused space under the grandstand. The racetrack was a few feet from the grandstand. The south curve of the track was almost coincident with the outer fence of the fairgrounds. Beginning within 75 feet of the southeast corner of the grandstand, there was heavy shrubbery all around the south curve of the track. Tr. 68; blueprint, plaintiff's exhibit 3. Furthermore, the track and the east side of the grandstand were deserted and unlighted at night. A pedestrian could unobserved pass back and forth between the outside and the grandstand in the shadow of the shrubbery; there would be small chance that an automobile driven in there would be observed. Our yeggman, therefore, placed his entrance underneath the grandstand at its extreme southeast corner. Great care was taken in finishing the exterior of the entrance door, so that its presence would not be observed; it was hung on leather hinges, so there would be no squeaking when it was pushed up. Making an entrance from beneath the grandstand into the auditor's room was a more difficult task. The room was much used during fair time, and it was, of course, essential that the entrance into it be not discovered. The skill with

which the work was done; the foresight with which every chance of detection was guarded against, is testified to by Hudson. Tr., 72, 75. It appears more conclusively from the fact that although Hudson and his assistants knew there was a door somewhere in the wall, they could only discover it by tapping carefully along the whole wall. Tr., 73. Here again noise was guarded against, for the panel was greased so it would slide easily. Tr., 75.

The yeggman now had provided an ideal means of entrance and exit to and from the auditor's room. His next care was to make preparations for getting quickly and quietly into the vault and safe when the time for the burglary arrived. There was no trouble about getting into the vault. The inner vault doors were never locked. Tr., 49. The combination lock on the outer door was set on three numbers. Tr., 103. It could be easily picked by an expert, who ought to get it in an hour's time, easily. Tr., 100-101. When the yeggman found the combination, he no doubt put it down so that he could open the door in a minute when the burglary was committed. In opening the vault door, however, he discovered that the door was sprung and one of the bolts bound, causing considerable noise in opening and closing the door. He therefore disconnected this bolt, wrapped it with tape so that the other bolt would not strike against it and make a noise, and oiled the other bolts so they would move smoothly. Tr., 99, 69. This brought him to the safe, the most serious

obstacle to be encountered. Its lock could not be opened by manipulation, as had been done with the lock on the vault door. The more numbers there are in a combination, the more difficult it is to open the lock by manipulation. Tr., 100. The safe combination was set on four numbers. Tr., 69. It might be the work of years to open a four-number combination by manipulation. Tr., 99. There is but one sure way to get at such a combination, and that is to drill into the lock. Any other way depends wholly upon luck. Tr., 102. Therefore, no expert attempts to open a burglar proof safe by manipulation. He drills, with a wire ascertains the numbers, then works the combination. Tr., 78-79. There are two places for drilling: where Larson did, or at the top. Tr., 82. The hole is usually drilled where Larson drilled if the driller is so situated that he can obtain a new dial rim. Tr., 95. A yeggman is necessarily an expert locksmith. The one with whose operations we are dealing had no thought of trying to open the safe by manipulation, but intended to drill, as any other expert would have done. It was necessary, however, that he leave no trace of his operations, and so he either carried with him, or procured after he had seen the safe, a new dial rim to take the place of the one which would be disfigured in drilling into the lock. Such rims are easily obtainable. Tr., 80. When he was ready to begin work, he probably bent the dial rim back, so that he would not be obliged to drill through it. This might be readily done. Tr., 95. If he did that, he would at

once have seen the place where Larson had drilled, and have drilled the plug out, or removed it by inserting a tap. Possibly he drilled through the rim, and struck the exact place where Larson drilled. There is a definite point at which to drill, and any expert would attempt to drill at that exact point. Tr., 79, 82. It is extremely improbable that the yeggman, drilling through the rim, would have exactly centered the plug put in by Larson. However, "The hole is not clean cut on the outside. It would be possible another drill went through there, because the hole is not true—it is not a perfect circle. * * * it might be possible a second hole went through there." Tr., 87. Whichever course was pursued, the plug put in by Larson was removed and the yeggman, doing what Larson did in 1922, inserted a wire in the lock, ascertained the combination numbers, and put them down. He then opened the safe, removed the disfigured dial rim, replaced it with a new one, and then closed and locked the safe, leaving it intact in outward appearance. That done the stage was set, and the production of the performance was easy. When the chosen time came, the burglar went underneath the grandstand, passed through the secret panel into the auditor's room, opened vault and safe with the combination numbers of which he had previously obtained knowledge, and carried the money out to an automobile awaiting him in the shadow of the shrubbery alongside the racetrack.

The points which defendant makes against a recovery on the foregoing theory, if we understand them, are these:

(1) *The evidence is as consistent with the theory that the safe was entered without force and violence as it is with the theory that force and violence were employed. When evidence presents two theories, upon one of which the defendant would be liable and upon the other he would not, there can be no recovery, for the jury will not be permitted to adopt one theory rather than the other.*

That is a most astonishing position to take. In the first place, the evidence is not as consistent with the theory that force and violence were not used as with the theory that they were. Defendant's counsel avoid the formulation of any definite theory, but none can be formulated of an entry without force and violence which will fit in with the accepted facts except this: Some time previous to the opening of the fair in 1924, some person who knew the combinations of vault and safe, presumably one of plaintiff's officers or trusted employes, planned to burglarize the safe during fair week. He constructed the doors in the grandstand and the wall of the auditor's room, either to divert suspicion or to afford him an exit without being seen, and fixed the vault door so it could be opened noiselessly. On the night of the burglary, he opened the vault and safe by working the combinations. The theory must now adopt two alternatives to explain the removal of the

plug which Larson drove in the hole he drilled, and the presence of the drill shavings which were found about the safe two weeks after the burglary was committed. One is that the burglar desired to assist plaintiff to recover from defendant, and so returned, opened the safe, took out the lock and removed the dial rim, drove out the plug that Larson put in, scattered drill filings around the safe and put some under the dial rim, then replaced all parts of the lock and closed and locked the safe. The other alternative is that plaintiff's officers removed the plug and scattered the drillings about for the purpose of fabricating a case against defendant. It overstrains credulity to accept either alternative. The person who committed the burglary would certainly not risk detection by going back to tamper with the safe when there was nothing for him to gain by doing so. So far as plaintiff's officers are concerned, they are men of means and of high position and standing. If they removed the plug and scattered the drillings about to make a case against defendant, they were guilty of a more heinous crime than the burglary. In their brief, defendant's counsel several times repeat that "it is presumed that an act has been rightfully done, and was not of a wrongful nature," citing pages of authorities to sustain the statement. Some one committed the burglary. That is not questioned. Counsel, however, would add another crime. They would have it that the burglary was committed by one of plaintiff's officers or employes, and that afterwards either

the burglar or some of plaintiff's officers who were innocent of the original offense, committed the crime of fabricating a case to cheat defendant out of the insurance money. The presumption counsel invoke militates against this pyramiding of crime, and requires that it be presumed but one crime was committed and that it was committed in the manner to which the evidence points.

Counsel's conclusion is more faulty than their premise. The rule for which they contend is stated in variant forms, but it comes to this: Where the plaintiff's case depends upon an inference to be drawn from the evidence, such inference must be the only one which can be reasonably drawn; "must be inconsistent with any other rational conclusion." Where two inferences may be drawn, the jury "may not speculate which to accept"; in order that the case may go to the jury, "The facts from which the inference is sought to be drawn must exclude any other hypothesis, and possibility is not sufficient." Defendant's brief, pp. 37-38.

The contention is not sustainable. If the law were so, no case could ever be made out by circumstantial evidence, for it is impossible to conceive of any combination of circumstances from which different inferences might not be drawn. Yet no one would question that circumstantial evidence may be, and frequently is, of greater probative force than direct evidence. See *Ex parte Jefferies* (Okl.), 124 Pac., 924, which Professor Wigmore says has be-

come the classical exposition of the value of circumstantial evidence. 5 Wigmore, Evidence, Supp. (2d ed.), §26. The rule with respect to circumstantial evidence is the same as that which prevails with respect to direct evidence: if different inferences may be drawn therefrom, it is the province of the jury to draw them.

> "Circumstantial evidence is legal evidence, and if the facts are shown by circumstantial evidence, and are such that reasonable men may reasonably differ upon the question whether there was negligence, the verdict of the jury should not be set aside or reversed. Meier v. Nor. Pac. Ry. Co., 51 Or., 69, 93 Pac., 691; C., R. I. & P. Ry. Co. v. Wood, 66 Kan., 613, 72 Pac., 215. So in the present case, if the facts are such that more than one reasonable conclusion or inference can be drawn from the circumstantial facts in evidence, one that negligence has been shown, and the other that negligence has not been shown, and the jury decide and determine that negligence has been shown, the action of the jury should not be disturbed."
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> *Calkins v. Blackwell Lbr. Co.* (Ida.), 129 Pac., 435, 440.
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> "The rule has been announced by this court that the jury cannot be permitted to indulge in mere conjecture; and that something more must appear in order to sustain a finding. St. L., I. M. & S. Ry Co. v. Henderson, 57 Ark., 402, 21 S. W., 878; Walker v. Louis Werner Sawmill Co., 76 Ark., 436, 88 S. W. 988. While this salutary rule is not to be ignored, it is equally well settled that any material fact in controversy may be established by circumstantial evidence; and that, though the testimony of witnesses may be undisputed, the circumstances

may be such as that different minds may reasonably draw different conclusions therefrom. Such a state of case calls for a submission to the jury of the questions at issue; and, where the circumstances are such that different minds may reasonably draw different conclusions therefrom, and the result is not a mere matter of conjecture, without facts or circumstances to support the conclusion, then it is the duty of the appellate court not to disturb the finding of the jury."

St. Louis etc. Ry. v. Owens (Ark.), 145 S. W., 879, 880.

See *Bradbury v. City of South Norwalk* (Conn.), 68 Atl., 321, and cited cases.

Nowhere has the rule above stated been more vigorously enforced than in the Federal courts.

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fairminded men will honestly draw different conclusions from them. Railroad Co. v. Stout, 17 Wall., 657; Washington & Georgetown Railroad v. McDade, 135 U. S., 554; Delaware & Lackawanna Railroad v. Converse, 139 U. S., 469.'

Richmond & D. Ry. v. Powers, 149 U. S., 43, 45.

This Court has said:

"It is just as well settled, however, that if reasonable minds may fairly draw different conclusions as to the facts, and different inferences from the evidence in respect to alleged con-

tributory negligence, the determination of that question is for the jury, under appropriate instructions from the court."

Evans v. So. Pac., 202 Fed., 160, 162.

In other circuits the rule is the same.

"It is not a sufficient reason for treating such a question as we have here as one of law that there is no conflict of testimony. Where two impartial and intelligent men could reasonably draw different inferences from an undisputed fact, a question for the jury is presented."

Western U. Tel. Co. v. Hall (4th C. C. A.), 287 Fed., 297, 303.

"When evidence of these facts is in conflict or of a nature from which reasonable men may honestly draw different inferences, the existence of the contract and its terms are matters of fact to be determined by a jury."

Pacific Mut. L. Ins. Co. v. Vogel (3d C. C. A.), 232 Fed., 337, 342.

"In disposing of a motion to direct a verdict, the trial court cannot weigh the evidence, but must take that view of the evidence which is most favorable to the parties against whom the motion is made, and deny the motion, if the evidence, when thus viewed, will warrant the conclusion that fair-minded men might honestly draw different conclusions therefrom."

Payne v. Haubert (6th. C. C. A.), 277 Fed., 646, 650.

"The facts were undisputed, and whether the defendant was negligent or not, and whether the plaintiff was in the exercise of due care or not, depended upon the inferences which might be reasonably drawn from these facts. If, upon either of these questions, these inferences could lead a reasonable mind to only one conclusion—upon the first that the defendant was not guilty

of negligence, or upon the second that the plaintiff was not in the exercise of due care—then clearly it was the duty of the presiding judge to have directed a verdict for the defendant; but if there were inferences which might be justifiably drawn from these facts by fair-minded men that would sustain the allegations of the defendant's negligence and the exercise of due care by the plaintiff, then it was the duty of the court to submit the evidence of these facts to the jury, although other equally fair-minded men might draw an opposite conclusion from them."

Boston El. Ry. v. Teele (1st. C. C. A.), 248 Fed., 424, 431.

"The well-established rule is that on a motion for a directed verdict the court must take the view of the evidence most favorable to the adverse party. Crookston Lumber Company v. Boutin, 149 Fed., 680, 79 C. C. A., 368; Southern Ry. Co. v. Gadd, 207 Fed., 277, 125 C. C. A., 21, affirmed 233 U. S. 572, 34 Sup. Co., 696. 58 L. Ed. 1099. Another rule, equally well established, is that only when all reasonable men, in the honest exercise of a fair, impartial judgment, would draw the same conclusion from the facts which condition the issue, it is the duty of the court to withdraw that question from the jury. District of Columbia v. Robinson, 180 U. S., 92, 21 Sup. Ct., 283, 45 L. Ed., 440; Delk v. St. Louis & San Francisco R. R. Co., 220 U. S., 580, 587, 31 Sup Ct., 617, 55 L. Ed., 590; St. Louis, Iron Mountain & Southern Ry. Co. v. Leftwich, 117 Fed., 127, 54 C. C. A. 1; Teis v. Smuggler Mining Co., 158 Fed., 260, 85 C. C. A., 478, 15 L. R. A. (N. S.) 893; Insurance Co. v. Hoover Dist. Co., 182 Fed. 590, 598, 105 C. C. A. 128, 136, 31 L. R. A. (N. S.) 873; Liberty Bell Gold Mining Co. v. Smugler-Union Mining

Co., 203 Fed., 795, 800, 122 C. C. A., 113, 118. *Hobbs v. Kizer* (8th C. C. A.), 236 Fed., 681, 682.

Further quotations are needless, for all decisions dealing with the subject are of the same tenor.

However, plaintiff is not obliged to rely upon the general principle above stated. Defendant's contention is ruled against it by *Travelers' Ins. Co. v. McConkey,* 127 U. S., 661, a case which is on all fours with the one at bar. The action was upon a policy of accident insurance. A stated sum was payable if the insured died as a result of "bodily injuries, effected through external, violent and accidental means," and provided that there should be no recovery if death resulted from "intentional injuries inflicted by the insured or any other person," nor unless the claimant should establish "by direct and positive proof that the said death or personal injury was caused by external violence and accidental means." The petition alleged that the insured was accidentally shot through the heart, whereby he instantly died. The allegation of accidental death was denied, and the answer alleged that the death of the insured was caused by suicide, or by intentional injuries inflicted by the insured or by some other person. The evidence showed no more than that the insured was found dead in his office late at night, with a bullet wound through his heart. There was also some evidence as to the movements of the insured on the evening of his death, and as to

the condition of his body and clothes, the effect of which is not stated. The defendant requested an instruction that the plaintiff was required to establish by direct and positive proof that the death was caused by external violence and accidental means, and also that the plaintiff's case could not rest upon conjectiure, but the proof must lead directly to the conclusion that the death was effected by accidental means. The instructions were refused. The Supreme Court held that the policy requirement of direct and positive proof of accidental death did not necessitate that direct evidence be given that the insured so died; that this might be found from the circumstances of the case. To quote (p. 667):

> "The facts were all before the jury as to the movements of the insured on the evening of his death, and as to the condition of his body and clothes when he was found dead, at a late hour of the night, upon the floor of his office. While it was not to be presumed, as a matter of law, that the deceased took his own life, or that he was murdered, the jury were at liberty to draw such inferences in respect to the cause of death as, under the settled rules of evidence, the facts and circumstances justified."

If in the cited case it was within the province of the jury to draw inferences as to the manner in which the insured met his death, it was clearly within the province of the jury in the present case to draw inferences as to whether the steel plug was removed from the safe door for the purpose of effecting an entrance, or whether it was done after-

wards to fabricate a case against defendant.

Equally decisive against defendant's contention is the decision of this Court in *United States F. & G. Co. v. Blum,* 270 Fed., 946. The action was upon an accident policy, to recover for the death of the insured by falling from a window in his office. He was alone in the room when he fell, and the occasion of the fall was unexplained, save as it might be inferred. There was a good deal of evidence as to his condition, physically, mentally and financially, from which different inferences might be drawn. The situation in which the evidence left the explanation of the cause of his death was thus stated by the Court (p. 952):

> "The deceased came to his death by one of three means. He either died through natural causes (that is, by sudden demise) and fell from the window, or he voluntarily threw himself therefrom, or he fell from the window or the coping outside through accidental means."

The defendant moved for a nonsuit at the close of the plaintiff's case, and for a directed verdict at the conclusion of the evidence. Both motions were denied. Holding that their denial was proper, this governing principle was stated (p. 952):

> "It goes without saying that, in order for plaintiff to recover, there must be evidence that an accident occurred conducing to the injury. This does not mean, however, that there must be eyewitnesses to the accident or direct proof of the pertinent fact. The fact is susceptible of proof, as any other given fact, and it may

> properly be deducible by inference and presumption from facts proven; that is, the fact of accident may be established by circumstantial evidence, as other pertinent facts may be established under the rules of evidence. Brunswick v. Standard Acc. Ins. Co., 278 Mo. 154, 213 S. W., 45, 7 A. L. R., 1213."

The final conclusion was as follows (p. 958):

> "True, the jury cannot be permitted to find its verdict upon conjecture and surmise; but, from a careful survey of the entire testimony found in the record, we are assured that there is afforded a much more stable basis for inference and deduction, and that it was quite sufficient whereon to submit the case to the verdict of the jury."

In that case, then, there were three inferences which might be drawn as to the manner in which the insured met his death, only one of which would sustain plaintiff's case. Moreover, the circumstances which the plaintiff in this action relies upon to sustain its theory are much more cogent and convincing than were the circumstances relied upon to sustain the plaintiff's theory in the cited case.

Similar insurance to that here involved was involved in *Fidelity & Cas. Co. v. Bank* (Okl.), 142 Pac., 312. The policy sued on insured against loss caused by the felonious abstraction of money from a safe by the use of tools or explosives thereupon. It provided that there should be no liability if any one connected with the assured, as employe or otherwise, participated in the burglary. The complaint

alleged an entry and abstraction within the terms of the policy. The answer was a general denial, and an affirmative defense that the safe was opened and the money taken by one or some of plaintiff's employes. The evidence showed that on a certain night the safe was closed and locked with a combination lock, and that the next morning a window in the bank building was found open, the safe door was open, and a considerable sum of money had been taken from the safe. There was evidence of some scratches on the door knob, and that there was difficulty in closing the safe door, which justified an inference that the door had been sprung. It was held there was evidence to take the case to the jury.

> "This evidence is admittedly weak and unsatisfactory; but it seems that every known fact was brought out at the trial; and outside of the physical facts relative to the condition of the safe before and after the burglary, and that the employes knew the outer combination, there is nothing tending to show any connection of an employe with the crime. If the safe was closed in such way that the time lock bolts failed to operate, and this because of defects in the construction, it would be possible to force the outside combination with tools or explosives without leaving any extensive evidence of their use. If the safe door was closed the night before and open next morning, and so badly sprung that it could not be closed, it might be fairly inferred that either a tool or an explosive had been used on it. The marks on the dial may or may not have significance; but they are in the case with the other facts, and the jury passed on their sufficiency."

The decision was based upon the principle stated in the preceding quotations, *viz.,* that where different inferences may be drawn from evidence, whether circumstantial or direct, it is the province of the jury to determine what inference shall be drawn. As stated by the Oklahoma court:

> "In determining whether there was any evidence to support the finding of the jury, we must take all the evidence and consider it in its aspects most favorable to plaintiff's contentions; and then if we find evidence, taken with all reasonable deductions and inferences, to be legitimately drawn for it, from which it can be fairly said that it tends to prove plaintiff's cause of action, we have no right to disturb the verdict; and notwithstanding that, from all the evidence adduced, were the court the trier of the facts, they might have found differently."

Such being the law, no purpose can be subserved by counsel dilating upon the strength of their client's case and the weakness of the adversary's. The place for such arguments was in the lower court. The jury saw and heard the witnesses, and got the force of the exhibits as explained by the witnesses under direct and cross examination. The trial judge, who had the same opportunity for full appreciation of the evidence that the jury had, was under obligation to grant a new trial if he believed the verdict to be against the weight of the evidence. Any argument here must be based upon mutilated evidence; mutilated by passing through the understanding and the reproduction of court reporter,

abstracter, and printer. No more is proper, therefore, than to point out such salient features of the evidence as make the case one for a jury's consideration, and that we have heretofore done.

Human nature, however, will not permit us to pass unchallenged some of the assertions made concerning the steel particles on the floor of the vault, the presence of which was not discovered until September 24th. According to plaintiff's theory, when the burglar drilled the plug out of the safe door, which was done some time previous to fair week, the particles thrown off by the drill fell upon the base on which the safe was set and upon the floor of the vault. The base on which the safe was set was of rough, unplaned boards. The care which the burglar exercised in every other particular leads to the conclusion that after he had completed the work he brushed up these filings so far as he was able to, and that the remainder of the filings lay undiscovered where they had fallen until the lock was removed and the removal of the plug was discovered on September 24th. Defendant's counsel say that could not be; that it conclusively appears the steel particles were not there the morning after the burglary. Counsel are in error. It is true the particles were not discovered the morning after the burglary or for some time thereafter. It is true that some of the police endeavored to make it appear that the particles would have been discovered had they been in the vault the morning after the burg-

lary. That is a vastly different thing from the establishment of their absence in such conclusive fashion that the jury would not be permitted to find the contrary. These particles are spoken of in the testimony as "shavings," a term implying something of bulk and readily discernible. It creates a wrong impression. They were minute particles, no larger than filings, which were thrown off by a drill. They were not observable except by chance or unless search was made for them. The vault is dark, save as it is lighted by an electric light (size not shown) in the ceiling. When the vault was entered the morning that the burglary was discovered, the safe was the first thing examined. It appeared to be intact, without a scratch on it. As the situation was seen by the investigators, there was no reason to search for steel particles about the safe, for there was nothing about the safe to indicate that the burglar had drilled into it or done any work upon it. The safe was not even carefully examined because, as Corey, the locksmith, said: "It was the consensus of opinion there was nothing the matter with it." Tr. 81. Reading between the lines, it is apparent what occurred. When the police saw that both vault and safe doors had apparently been opened by manipulation of the combinations, with no evidence of violence in entering either the building, vault, or safe, they jumped to the conclusion that it was an "inside job," done by some fair official or employe, and that their task was to detect him. From that time on, their search around the vault and safe was

for finger prints. There was no reason for them to look for drillings or filings, and they did not do so. Seeking for what they were seeking, it would have been purest chance had they discovered the steel particles, and chance did not intervene. Having set their minds upon a theory, they stubbornly adhered to it. They would not admit that laymen had discovered what they overlooked, so as witnesses they made the most of the thoroughness of their search. It is patent that it was for the jury to say whether they might have overlooked the steel particles.

Other circumstances lead to the same conclusion. We must assume from the care displayed by the burglar in other particulars that he removed such of the steel particles as could be readily brushed up, and that there were a comparatively small quantity remaining, so small that they would not be readily discerned unless search was made for them. The filings were first discovered immediately after the hole in the safe door was discovered. The light in the ceiling of the vault had been turned off and Corey was using a strong flashlight under the safe. It was natural that after the hole was discovered it would be expected that there would be drillings about the safe. That would naturally lead to a search which had not theretofore been made, to discover if there were drillings about the safe.

Again, there were more filings about the safe when they were discovered on the 24th than there were the morning after the burglary. Corey testified that

when he removed the dial rim some shavings came out with it from underneath the dial rim. Tr., 82, 91. He explained their presence within the dial rim by saying that a certain quantity of the shavings would be left in the hole after it was drilled, and that the slamming of the door back and forth would cause the shavings to drop out from it down into the dial rim, where they would remain until the dial rim was removed. Tr., 92-93. The quantity of filings that were underneath the dial rim was not stated, but whatever the quantity, they were by so much more than were there the morning after the burglary, and the detection of the filings would be by so much the easier.

Taking all these things into consideration, it was evidently for the jury to say whether or not the filings (with the exception of those under the dial rim) were about the safe on the morning after the burglary and were not discovered because not searched for, or whether they were not there at that time and were subsequently "planted" for the purpose of helping to make a case against defendant.

What is defendant going to do with the undeniable fact that the steel particles were there on the 24th? Counsel say they are not required to speculate as to that. Ah, but they are. If no other reasonable theory for the presence of the particles can be suggested, it must be accepted as an established fact that they were made by the burglar in drilling out the plug in the safe door. Although they endeavor

to evade the downright assertion, counsel must propose the theory that the particles were placed there by plaintiff's officers for the purpose of fabricating a case against defendant. There is no middle ground between that theory and the theory that they were made by the burglar in drilling. Certainly, it was for the jury to say which was the more probable theory.

We do not wish it understood that it was essential to plaintiff's case that the jury find the particles were on the floor of the vault directly after the burglary. Their presence was a mere collateral incident, tending to support plaintiff's theory but not essential to it. If the jury felt itself unable to decide whether the particles were present on the morning after the burglary, but were overlooked by the police, it could have put that incident aside without decision without impairing the final decision, based upon the other circumstances, that force and violence were exerted in effecting an entry into the safe. The plug was removed. That is undenied. If it was removed in the process of effecting an entry into the safe by the burglar, that is all that is necessary. It is not necessary to connect the steel particles on the floor of the vault with its removal.

It is impossible to remark upon the numerous decisions which counsel cite under this head. We take three, which, from their position in citation, are presumably the leading ones, for remark.

In *Manning v. Insurance Co.,* 100 U. S., 693, an

insurance agent, sued for money in his hands belonging to the company, pleaded as a set-off commissions which he alleged to be due him on insurance premiums received by the company. The claimed commissions were only payable when the company had actually received the premiums. The agent offered no evidence that the company had received the premiums. He proved that on a stated date there were policies of a given amount in effect, but did not prove that such policies had been continued in effect, or that any of the premiums thereon had been paid to the company. That, manifestly, was an attempt to draw an inference from an inference; from proof that policies had once been in effect to draw the inference that they had been continued in effect, and from that inference to draw the further inference that the company had received the premiums thereon. As the Court said (pp. 698-99):

> "That renewal premiums to a certain amount, upon which he was entitled to commission, had been paid to the company, was the ultimate fact which was necessary to be proved. What the evidence did prove was, that there were policies in force on the 2d of June, 1871, the annual premiums upon which were $87,000; that he would be entitled to commissions upon renewals of the policies, if they should be thereafter renewed, and if the renewal premiums should be paid to the company, and that these premiums were to be collected by his sub-agents and paid over by them. These were the primary facts. Every thing more was left to presumption. The jury, therefore, were to presume that the policies did not lapse, and that they were renewed.

> Built on this presumption was another, namely, that the renewal premiums were paid to the agents; and upon this a further presumption, that the premiums had been paid over by the agents to the company, or had been immediately collected by it. This appears to us to have been quite inadmissible. A verdict of a jury found upon such evidence would have been a mere guess. The evidence of fact did not go far enough."

The Patton Case (179 U. S., 658), is too well known to need more than bare remark. There was not a scrap of evidence tending to show how the engine step, the turning of which caused the plaintiff's injury, became loose. The plaintiff relied on the doctrine of passenger cases, which the Court refused to apply. Of course the case does not touch the settled rule of the Federal courts, that if the evidence warrants an inference of liability, it is not insufficient because an inference of non-liability might also be drawn from it.

United States etc. Co. v. Bank, 145 Fed., 273, was an action upon a fidelity bond, given to insure the honesty of an employe of a bank. A sum of money disappeared. Several employes had equal means of access to the safe where the money was kept, and equal opportunity to take the money. There was no evidence, no circumstance, even the slightest, tending to show that the insured employe, rather than other employes having equal opportunity, took the money. Naturally, it was held there could be no recovery.

So far as the language quoted from the last case is concerned, the same Court, holding that a case was made for the jury when different inferences might be drawn from circumstantial evidence, said of the language used in the cited case:

> "It is not easy to formulate a general rule that will determine in advance the effect of, or the weight that shall be given to, the infinite variety of circumstances that may be offered to establish a principal fact under judicial investigation; and plainly it was not intended to do so in that case, or in the case from which the quotation is made. Each case must rest upon its own facts, and under the facts there shown it is entirely plain that the circumstances were insufficient to warrant a finding that the pecuniary loss of the bank resulted from the 'personal dishonesty or culpable neglect' of the bonded teller. When different inferences or conclusions may fairly and reasonably be drawn by impartial minds from the proven facts, it is the province of the jury, under proper instructions from the court, to draw them; and only when the facts are such that but one conclusion or inference can reasonably be drawn therefrom may the court declare that conclusion. Northwestern Fuel Co. v. Danielson, 57 Fed. 915-920, 6 C. A. C., 636; Goldsmith v. Thuringia Ins. Co., 114 Fed. 914-916, 52 C. C. A. 534; and this is all that is held in United States Fidelity & Guaranty Co. v. Des Moines Nat. Bank, above."
>
> *Finch v. Ottawa,* 190 Fed., 299, 303.

While we shall not remark upon any of the other cases cited by defendant, we will say that we have run through them, and every one is as wide of the mark as those we have referred to.

We submit there are but two inferences which can be drawn from the evidence in the present case. The first is that the burglary was committed by a skillful yeggman, who laid his plans and carefully made his preparations some time before the fair opened, so that when the appointed time came he might quickly and noiselessly effect an entrance and take the money. In preparing for the burglary, he drilled out the plug which Larson had put in, so that he might learn, as Larson had done, the combination of the safe through the hole into the lock. The second is that the burglary was committed by officers or employes of plaintiff, who knew the combination of the safe and opened the door by working it, then later removed the plug and scattered drill shavings around in order to fabricate a case against defendant. Now, there is in evidence a mass of circumstances all having weight, some more, some less, in the determination of which was the more reasonable theory. Most important were the circumstances indicating how the burglary was committed, for from these it could almost infallibly be determined whether the work was that of a skilled yeggman or of an amateur. Among other circumstances the jury had the right to consider, was the care taken to prevent discovery of the preparations made for commission of the burglary before it was committed, and to prevent detection when the burglary came to be committed. There was the location of the entrance to the space beneath the grandstand next to the racetrack, in such position that a person coming

from outside the fairgrounds could keep within the shadow of the shrubbery along the racetrack until he was almost to the entrance, thus practically insuring him against detection as he went in and carried the money out. The manner in which the entrance door was constructed, with leather hinges so there would be no squeaking when the door was opened, and with the sawed boards painted over with white paint mixed with earth, giving them the same appearance as the wall around them and preventing detection of the door from the outside, were pertinent circumstances. The manner of the construction of the panel leading into the auditor's room was even more important. It must have been made by one very skillful in the use of tools, for only the most careful search by men who were convinced there was an entrance somewhere in the east wall of the room brought it to light. Here again care was taken that there should be no noise when the panel was opened, for it was greased so that it would slide easily and noiselessly. The same care was observed in the preparation of the vault door, when the one bolt that bound so that it would make a noise when the door was opened was disconnected and wrapped with tape so that the other bolt would not make a noise by striking against it, and the other bolts were oiled so they would slip smoothly in and out of their sockets. The work on the safe was that of an expert. The plug that Larson had put in was removed and a new dial rim was put on, leaving no trace of what had been done. As the result showed, only an

expert locksmith, taking the lock to pieces, could discover what had been done. If defendant's theory is the correct one, the man who did all these things was an amateur, probably unskilled in the use of tools. If the plaintiff's theory is correct, the work was done by a skilled yeggman. As a part of their trade, such men must be skillful in the use of tools of all sorts, and, of course, they must be able to foresee, before undertaking the job, all the dangers which will arise in its execution and make preparations to forestall, so far as possible, all such dangers. Patently, it was for the jury to say, in view of all those circumstances, whether what was done was the work of a skilled yeggman or of a bungling amateur.

Again, acceptance of defendant's theory entails acceptance of the idea that some officer or employe of the fair who knew the combination of the safe door unlocked it. It appears that the only persons who had knowledge of the combination were Mr. Griffith, plaintiff's president; Mr. Semple, who is assistant to the president; Mr. Reinhard, the auditor; George Nettleton, who had previously to this fair been deputy auditor, and Mr. Hannon, who was at one time manager of the fair. Mr. Nettleton and Mr. Hannon were not in Spokane when the burglary was committed. Tr., 69. If entrance to the safe was effected in accordance with defendant's theory, it was effected by Mr. Griffith, Mr. Semple or Mr. Reinhard, and one of those gentlemen must have

afterwards "planted" the steel shavings so as to fabricate a case against defendant. Was it not for the jury to say whether it was probable that any of these gentlemen, or all of them combined, would commit the dual crime of burglarizing the safe and then fabricating a case to cheat defendant?

In none of the cases cited by defendant upon this point were there any circumstances tending to indicate whether the one theory or the other should be adopted. Patently, they are utterly inapplicable to a case where so many cogent circumstances to determine a choice are present as there are in this case.

(2) *The removal of the plug was not a visible mark of force and violence.*

When the hole that Larson drilled had served his purpose, he stopped it by driving in a steel plug. The plug then became a part of the door, serving the same purpose as the original material which had been drilled away. No person could thereafter obtain knowledge of the combination by penetrating to the lock through that hole without removing the plug. The plug could not be removed without the use of force and violence, and assuredly the hole left after the plug had been removed was a visible mark of the force and violence used. We assume that counsel would not contend that if no hole had ever been drilled in the safe, and the burglar drilled a hole in the original material for the purpose of

penetrating to the lock chamber and learning the combination, that the hole remaining would not be a visible mark of the force and violence employed. If that is true, then the hole left after the removal of the plug was a visible mark of the force and violence used in removing it. It is idle to attempt to distinguish between the original material of the door which Larson removed in order to effect an entrance, and the substitute material put in by Larson which the burglar removed in order to effect an entrance.

Furthermore, the reason for the requirement that there should be a visible mark does not necessitate that there should be any particular kind of a mark. The policy insures against burglary, as contradistinguished from theft. To restrict liability to burglary, and to guard against the possibility of an inference that force and violence had been used when there was no clear evidence of it, the provision that the force and violence must be evidenced by a visible mark was inserted. Any sign, therefore, which evidences force and violence satisfies both letter and reason of the policy. As to what is sufficient, see *National Surety Co. v. Silberberg* (Tex.), 176 S. W., 97; *General Accident Corp. v. Stratton* (Ky.), 178 S. W., 1060; *Maryland Cas. Co. v. Bank* (Neb.), 107 N. W., 562; *Palace Laundry Co. v. Royal Indemnity Co.* (Utah), 224 Pac., 657; *Goldman v. New Jersey Fidelity Co.* (Mo.), 183 S. W., 709; *Fidelity etc. Co. v. Bank* (Okla.), 142 Pac., 312.

(3) *Plaintiff misrepresented the construction of the safe.*

This point is based upon the fact that in the description of the safe which is appended to the policy sued on, the outer door of the safe was described as quarter inch steel, and no mention was made of the hole that had been drilled in it and the plug inserted therein. Assuming this to have constituted a misrepresentation, it was not material to the risk. The burglar was obliged to drill the plug out in order to make use of the hole for entering the safe, or to drill into the plug, insert a tap, and then pull the plug out. Either operation was as difficult as drilling through the door as Larson did. The burglarizing of the safe was not rendered easier by the presence of the plug.

At any rate, a section of the insurance laws of Washington provides that:

> "No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching, unless such misrepresentation or warranty is made with the intent to deceive."
>
> 2 Remington's Comp. Stat., 1922, §7078.

Defendant did not plead misrepresentation as a defense, or ask submission of the issue of misrepresentation to the jury, so that it might pass upon the question of intent to deceive. In fact, no representations of any sort were made by plaintiff. Plain-

tiff's president called up defendant's local agents on the telephone, and asked them to put on a burglary and hold-up policy. On that direction the policy sued on was issued. Tr., 37. What appears in the policy was inserted by the agents upon their own information and initiative.

(4) *The safe was entered by manipulation of the lock.*

The entrance was effected by force and violence, combined with manipulation of the lock. The burglar could not manipulate the lock without knowing the combination. By the exertion of force and violence he penetrated the chamber containing the lock, inserted a wire, and was thus enabled to ascertain the combination. With the knowledge so gained, he manipulated the lock and opened the door. It was the prior exertion of force and violence which rendered the manipulation of the lock possible.

That being so, this point is ruled against defendant by the doctrine of proximate cause. The policy insures against loss caused by the taking of property from the interior of the safe if entry into the safe was effected by force and violence. Tr., 8-9. If force and violence were the proximate cause of the entry, defendant is not relieved from liability because of an intermediate cause, not covered by the policy, albeit such intermediate cause contributed to the entry. That force and violence, the penetration of the lock chamber by drilling, was the proximate

cause of the entry into the safe, is established by *Insurance Company v. Boon,* 95 U. S., 117. A policy insuring against loss by fire stipulated that the insurer should not be liable if the insured property was destroyed by a fire taking place "by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." During the civil war, the town in which the insured property was situated, which was occupied by Federal troops, was attacked by Confederate troops. The Federal commander defended the town for some time, then seeing that he could not continue the defense, he set fire to the city hall, which contained military stores, so that they might not fall into the enemy's hands. The fire spread to other buildings, and ultimately destroyed the insured property. In an action upon the policy, the question was whether the Confederate invasion was the proximate cause of the destruction of the insured property, in which event the insurer would not be liable, or whether the setting of the fire was an independent, intervening cause, in which event the insurer would be liable. Holding that the invasion was the proximate cause of the loss, the Court said (p. 130):

> "In view of this state of facts found by the court, the inquiry is, whether the rebel invasion or the usurping military force or power was the predominating and operative cause of the fire. The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim *causa proxima, non remota spectatur.*

"The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

After the discussion of authorities, it was further said (pp. 132, 133):

"It is a doctrine resting upon reason, and in accord with the common understanding of men. Applying it to the facts found in the present case, the conclusion is inevitable, that the fire which caused the destruction of the plaintiffs' property happened or took place, not merely in consequence of, but by means of, the rebel invasion and military or usurped power. The fire occurred while the attack was in progress, and when it was about being successful. The attack, as a cause, never ceased to operate until the loss was complete. It was the *causa causans* which set in operation every agency that contributed to the destruction. It created the military necessity for the destruction of the military stores in the city hall, and made it the duty of the commanding officer of the Federal forces to destroy them. His act, therefore, in setting fire to the city hall, was directly in the line of the force set in motion by the usurping power, and what that power must have anticipated as a consequence of its action.

* * * * *

"In the present case, the burning of the city hall and the spread of the fire afterwards was not a new and *independent* cause of loss. On

the contrary, it was an incident, a necessary incident and consequence, of the hostile rebel attack on the town—a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power—events so linked together as to form one continuous whole."

In *Milwaukee Ry. v. Kellogg,* 94 U. S., 469, 474, it was said:

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

In *Insurance Co. v. Transportation Co.,* 12 Wall., 194, a part of the syllabus is as follows:

"When two causes of loss occur, one at the risk of the assured and the other insured against, or one insured against by A. and the other by B., if the damage caused by each peril

> can be discriminated, it must be borne proportionately.
>
> "But if the damage caused by each peril cannot be distinguished from that caused by the other, the party responsible for the predominating, efficient cause, or that which set in operation the other incidentally to it, is liable for the loss."

Undoubtedly, the predominating, efficient cause for the entry into the safe in the present case was the force and violence by means of which the combination of the lock was ascertained. The manipulation of the lock which followed was a mere incident, necessary to the opening of the safe, but which would not have occurred but for the preceding force, by means of which the manipulation was rendered possible. Adapting the language of the Boon Case, the force and violence by means of which the combination was learned, and the manipulation of the lock which followed upon and was made possible by the force and violence, constituted a continuous chain of events—"events so linked together as to form one continuous whole."

Another viewpoint. By one part of the policy, defendant is made liable if entry into the safe is effected by force and violence. By another part, defendant is exempted from liability if the safe was entered by manipulation of the lock. Which provision governs when, as here, both manipulation and force and violence have played a part in effecting the entry? The policy makes no provision for such

a case. The language of the policy is, as to such a case, ambiguous, and there should be applied the rule stated in these words:

> "The rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it."
>
> *Mutual Ins. Co. v. Hurni Co.,* 263 U. S., 167, 174.

Or as it is stated by this Court:

> "It is the language of the insurance company that we are called upon to construe, 'and it is both reasonable and just that its own words should be construed most strongly against itself.' "
>
> *Aetna Ins. Co. v. Sacramento Co.,* 273 Fed., 55, 58.

Still another viewpoint. Considering the policy as a whole, it is apparent that the sole purpose of the provision that defendant should not be liable if entry to the safe was effected by manipulation of a lock, was to ensure that it should only be held for a loss in which force was a causative factor, and not for a loss caused by mere thievery. In the main part of the policy, defendant agreed to indemnify "for all loss by burglary," then added the express stipulation that liability should only attach if entry into the safe was effected "by actual force and violence of which force and violence there shall be visible

marks. " Tr., 8-9. That would appear to be sufficient to restrict liability to losses in which force was an element, and to exclude liability for loss caused by mere thievery, but defendant, after the fashion of insurers generally, added a number of precautionary provisions, the only effect of which was to further safeguard against liability being imposed for theft. These will be found under the head of the policy entitled "exclusions," Tr., 10-11, and prominent among them is the provision that there shall be no liability if entry to the safe is effected "by opening the door of any vault, safe or chest by the use of a key or the manipulation of any lock." Clearly, that only expresses in another form what was provided in the preceding part of the policy, viz., that defendant should only be liable for a loss caused by burglary, for a loss occasioned by an entry into the safe which was effected by force and violence. Since the only purpose of the provision was to make certain that defendant should not be held liable for loss caused by thievery alone, as contradistinguished from a loss caused by burglary, in which force and violence played a part, it does not stand in the way of recovery where force and violence were effective factors in causing the loss. albeit the manipulation of a lock contributed to the result. Take this supposititious case: Suppose that the burglar had drilled into the lock chamber, and then instead of using a wire to ascertain the combination numbers, he had injected some explosive, by the explosion of which the effectiveness of the

combination lock was destroyed and he was thereby enabled to manipulate the lock and open the safe. Would it not certainly be held in such a case that entrance was effected by force and violence within the meaning of the policy? And if it would be so held in the supposititious case, why must it not be so held in the actual case?

Of the decisions cited by defendant under this head, substantially all are so absurdly irrelevant that we shall pay no heed to them. Two or three may merit brief mention. These hold that when the safe described in the policy has several doors, and the policy warrants the construction that each of these must be opened by force in order to render the insurer liable, there can be no recovery where one of the doors was opened by manipulation of the lock, albeit force was employed in opening the other doors. The leading case of that class is *First Nat'l Bank v. Maryland Cas. Co.* (Cal.), 121 Pac., 321. The policy sued on in that case insured against loss by burglary from the safe or safes described in the schedule attached when entry was made into such safe or safes by the use of tools or explosives directly thereupon. There was a special agreement that the insurer should not be liable for the loss of money from a burglar-proof safe containing an inner steel burglar-proof chest, unless the money was "abstracted from the chest after entry also into the said chest effected by the use of tools or explosives directly thereupon." The safe referred to in the

policy had an outer door which was secured by a combination lock and a time lock. Inside it was a burglar-proof chest in which the money was kept. This was only secured by a combination lock. Some time before the burglary which was the occasion of the action, the assured employed a locksmith to do some work about the safe, the vault in which the safe was located, and the locks on the doors of both. While so employed, he ascertained the combinations on all the doors. Knowledge of the combination on the outer safe door would not avail him, because the time lock prevented the use of the combination until the hour for which the lock was set arrived. That, of course, would not be an hour when burglars could operate. He therefore tampered with the time lock, so that if the door were struck with a heavy hammer in a given place, the time lock would be disarranged and rendered inoperative, and the combination could be worked. The numbers of the combinations were given to a confederate, and he was instructed what to do to put the time lock out of order. At a suitable time the confederate broke into the building, opened the vault door with the combination given him, struck with a heavy hammer the handles of the outer door of the safe until the time lock was put out of order, then opened that door and the door of the inner burglar proof chest by working the combinations. It was held there could be no recovery; that although the outer door of the safe was opened by the use of tools, the door of the inner chest was opened by the use of the combination alone.

There is little to criticize in the decision, although, as we shall later show, it is opposed to the weight of authority. The policy contained a special agreement that the insurer should not be liable for money taken from the inner chest unless it also was entered by the use of tools or explosives. Concededly, it was not so entered. Tools were used on the outer door only, and the inner door was opened solely by working the combination, knowledge of which had been wrongfully obtained. But we do not understand how it can be thought that the decision bears upon the present case. Here the safe had only a single door, and moreover there was no special agreement such as was contained in the policy in the cited case. Indeed, the decision is inferentially opposed to defendant's position. In the cited case, the entry through the outer door of the safe was partly effected by the use of tools, whereby the time lock was rendered useless, and partly by working the combination. Here the entry was partly effected by force and violence, drilling into the lock chamber to ascertain the combination, and partly by working the combination. In the cited case, it was held that so far as the outer door of the safe was concerned, entry was effected within the terms of the policy; that the plaintiff's case failed only because the entry into the inner chest was not so effected. To quote (p. 326):

> "It may, of course, be conceded that the entry into the safe itself was effected partially by the use of the hammer operating to disarrange the

> time lock after it had been adjusted by Martin, so that this might be accomplished, and partly by the use of the combination which could be used after the time lock had become ineffective. And, for present purposes, it may be conceded that the entry into the safe was made by the use of tools directly upon the safe. But to make the defendant liable under the provisions of the policy it was incumbent on plaintiff to prove that, not only was entry made into the safe by use of tools, but that tools were used directly upon the inner chest itself."

Obviously, if the California court had been dealing with a case like the present, where but a single door is involved, and entry was effected partly by force and partly by manipulation, it would have held the entry was within the terms of the policy.

While of no importance to the present case, it should be remarked that the decided weight of authority is that when there is more than one door to a safe, an entry through one of the doors which is within the terms of the policy warrants recovery, notwithstanding the entry through the other door or doors, whether inner or outer, was not of such a character as would entitle the assured to recover. *Moskovitz v. Travelers' Indemnity Co.* (Minn.), 174 N. W., 616; *Columbia Casualty Co. v. Rogers Co.* (Ga.), 114 S. S., 718 (Court of Appeals), 121 S. E., 224 (Supreme Court); *National Surety Co. v. Chalkley* (Tex.), 260 S. W., 216; *Fidelity & Casualty Co. v. Saunders* (Ind.), 70 N. E., 167; *T. J. Bruner Co. v. Fidelity & Casualty Co.* (Neb.), 166 N. W., 242;

Rosenbach v. National Fidelity Co. (Mo.), 221 S. W., 386. The California case must either be distinguished from those cases by virtue of the special agreement relating to the entry to the inner chest which was there involved, or be held opposed to the great weight of authority.

(5) *Any force and violence exerted upon the safe, and any visible marks thereon, were exerted and made prior to the policy period.*

That is undoubtedly true, but how does it affect plaintiff's right to recover? By the first paragraph of the policy, defendant agreed to indemnify the assured for all loss by burglary occasioned by abstraction of property from the interior of the safe described in the policy by any person making felonious entry into the safe by actual force and violence, of which force and violence there should be visible marks made upon the safe. Tr., 8-9. Possibly if this clause stood alone there would be some ground for the contention that in order to hold the defendant liable it must appear not only that the loss occurred during the policy period, but that the force and violence used in effecting entry to the safe should also appear to have been exerted during that period. At least, there is nothing in that paragraph which expressly negates the idea that to warrant a recovery it is necessary to show that the loss and everything leading up to it occurred during the policy period. However, by the fourth paragraph of the policy that idea is negated, and it is clearly ex-

pressed that to establish a right to recover it need only be shown that the loss occurred during the policy period. That paragraph reads: "This agreement shall apply only to loss or damage as aforesaid occurring within the policy period defined in item 4 of the declarations," etc. Tr., 9. Here, then, is a distinct statement, something which does not appear in the first paragraph, that the policy covers any loss which occurs within the policy period. Paragraph four was inserted for the purpose of making clear and unmistakable the extent of defendant's liability so far as the policy period was concerned. Had defendant intended that it should be held liable only in the event that not only the loss, but all things leading up to and rendering the loss possible, should have occurred within the policy period, it certainly would have so stated in paragraph four. Having attempted by that paragraph to state clearly the limitation of its liability so far as concerned the policy period, it would not have stopped until it had covered all contingencies.

Moreover, what reason could there be for requiring that the force and violence exerted and the visible marks made should have been within the policy period? The requirement that force and violence should be used and visible marks should be present was for evidential purposes only. What the defendant was insuring against was loss caused by burglary, in which force was a factor, and it was careful to exclude any notion that it insured against

mere theft, in which force played no part in causing the loss. It could make no difference to defendant whether the force and violence were used and the evidence thereof made before the policy period or during it. Those requirements were merely to furnish the evidence that the loss was caused by the thing insured against, burglary accompanied by force, and not by a thing not insured against, theft without force.

At any rate, under what rule of construction can the language used be turned into a provision that although loss occurs during the policy period there shall be no liability therefor if preparations for committing the burglary were made before it? Surely if defendant so desired to limit its liability, it would not have left the matter to conjecture but would have unmistakably stated the limitation in the policy. A considerable part of the policy is taken up with exclusions from liability. Tr., 10-12. The long list of exclusions shows that defendant understood the importance of stating definitely and clearly the exact limits of its liability, and of excluding by express provision any borderland case for which it did not intend to be bound. A corporation whose business is of the scope of defendant's, and possessing the experience that it has in writing burglary insurance, is certainly aware that when the taking of a large sum of money is planned, running, as this did, to over $20,000, many preparations are made before, and usually a considerable time

before, the actual taking. If it did not want to be held liable in a case where the preparations for a burglary antedated the policy period, it would have so provided in its exclusions. Furthermore, in this case defendant was dealing with an assured who was engaged in an unusual line of business. Each year, for the space of a week, it received large sums of money, for the protection of which it desired insurance. The surrounding circumstances were such that no successful burglary could be perpetrated unless preparations therefor were made before the beginning of the fair. That is proven by the situation as it is disclosed by the evidence here and by what the burglars actually did to make the burglary successful. Because the policy period was so short, it is evident that plaintiff did not want, and would not have taken, a policy insuring against burglary, but stipulating that there should be no liability unless it proved that all the preparations for the burglary, as well as the actual taking, occurred during the policy period.

Apart from any other consideration, to construe the policy as defendant requests would be to construe ambiguity in favor of the insurer and against the assured, and to extend the language of the policy to include what is not written, and is not necessarily implied, in order to exempt the insurer from liability. That would be flatly contradictory of the cardinal rule for the construction of insurance policies.

"If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because those instruments are drawn by the company."

Thompson v. Phenix Ins. Co., 136 U. S., 287, 297.

"But, without adopting either of these constructions, we rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

National Bank v. Insurance Co., 95 U. S., 673, 678.

(6) *Steel shavings were not found until September 24th.*

Remembering that counsel are arguing that there was no evidence for the jury to consider, and that

therefore defendant's motion for a directed verdict should have been granted, the materiality of that fact is not apparent, and counsel do not enlighten concerning it. Of course the presence of those shavings, and the fact that they were not discovered before the burglary, nor for two weeks afterwards, were circumstances to be considered by the jury in determining whether plaintiff's or defendant's was the correct theory of the nature and manner of the burglary. But surely counsel would not be understood to say that the presence of the shavings was essential to plaintiff's case, and that, as matter of law, plaintiff cannot recover because the evidence shows (as counsel assume) that the shavings were not in the vault the morning after the burglary. That would be (to borrow a word from counsel) preposterous. At any rate, that claim is not made. Counsel have merely taken 10 to 12 pages of their brief to reproduce their argument to the jury that the shavings found on the 24th were "planted" after the burglary was committed. Assuming that the Court does not possess or desire to exercise the powers and functions of a jury, we shall not counter by reproducing the arguments by which the jury trying the case was convinced that counsel were in error. Evidently, it was for the jury to say whether minute steel particles, scattered around in a vault whose only light was afforded by an electric light, of unstated size, in the ceiling, were so conspicuous that it would be impossible to overlook them.

Instructions Given and Refused.

(1) The first complaint made under this head is that an erroneous construction was placed upon the policy sued on, in that the jury was instructed (in effect) that there could be a recovery although the force and violence used and the marks made upon the safe antedated the policy period. We discussed this subject under the preceding head, and do not desire to add anything to what is there said. The authorities cited by defendant under this head have not the remotest bearing upon the subject.

It is to be observed, however, that the jury was instructed that defendant could not be held liable unless the money was taken from the safe during the policy period; that while it would not defeat recovery if the plug was removed and the combination learned before the policy period began, there could be no recovery unless the money was taken during that period. Tr., 144.

(2) Next, complaint is made of the refusal to instruct that there could be no recovery if the safe was opened by manipulating the lock. In so far as the complaint goes to the construction of the policy, to the claim that there could be no recovery if force and violence and manipulation combined to effect an entrance, we regard our discussion of the subject under the preceding head as sufficient.

However, some finical criticisms are made which may be dignified with brief notice. It is said that

the jury was not instructed that there could be no recovery if the door was opened solely by manipulating the lock, and that while the jury was instructed that it was necessary to show force and violence in making an entry, nothing was said about visible marks, and the instruction was so worded that the force and violence referred to might have been understood as that employed to effect an entry through the grandstand, or into the auditor's room, or to what was done to the vault door. Regard for counsel's good faith requires the inference that they did not hear or read the instructions given, else they would not have made such claims. The jury was told that the safe, not the vault, was the thing covered by the policy, and that "the actual force and violence provided by the policy has reference to effecting an entry into the safe as contradistinguished from the vault." Tr., 142. Also that it was necessary that the loss should be one occasioned by burglary, by "abstracting money from the interior of the safe in question by a person or persons making felonious entry into such safe by actual force and violence, of which force and violence there shall be visible marks made upon the safe by tools." Tr., 143. There were other instructions relating to the drilling of the original hole, its plugging, and what would be necessary with respect to its removal to constitute force and violence within the meaning of the policy. Tr., 143-145. This followed:

> "The sole force and violence which you will consider is the force and violence, if any, em-

ployed in drilling out or drawing out the plug from the hole in the safe door, if you find from the evidence that the hole had been closed as already stated, and that such plug was drilled or drawn out, and the only visible mark showing the use of tools which you can consider is the hole in the safe door made by drilling out or extracting the plug in question if you find such hole was so made.

"On the contrary, I charge you that if entrance to the safe was effected without the employment of actual force or violence, but by means of working or manipulating the combination on the door of the safe, and the person so working or manipulating such combination without force or violence was enable to gain access to the interior of the safe and thereby steal and carry away its contents, such an entrance is not within the terms of the policy in suit, and the defendant company is not liable therefor.

"I further charge you that the burden of proof in this case rests upon the plaintiff to establish that at the time and upon the occasion in question the safe was burglariously entered by some person or persons, and that such felonious entry into the safe was effected by actual force and violence, of which force and violence there must be visible marks made upon such safe by tools, and that by means of the entry so effected the money in question was abstracted from the safe." Tr., 145-146.

(3) Refusal to instruct that there could be no recovery unless the jury found that the plug was removed by the burglar is next complained of. Reference to the instructions given, especially those appearing on pages 143 to 146 of the transcript, shows

that the subject matter of the requested instruction was dealt with from every viewpoint suggested by the evidence, and in such a manner that the jury could not misunderstand what it was required to find with regard to the removal of the plug to warrant a verdict for plaintiff.

There is no error, and the judgment should be affirmed.

Respectfully submitted,

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